

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION,  
THE FINANCIAL SERVICES  
ROUNDTABLE, and CONSUMER  
BANKERS ASSOCIATION,

Plaintiffs,

v.

NO. CIV. S 04-0778 MCE KJM

MEMORANDUM AND ORDER

BILL LOCKYER, in his official  
capacity as Attorney General  
of California, HOWARD GOULD,  
in his official capacity as  
Commissioner of the Department  
of Financial Institutions of  
the State of California,  
WILLIAM P. WOOD, in his  
official capacity as  
Commissioner of the Department  
of Corporations of the State  
of California, and JOHN  
GARAMENDI, in his official  
capacity as Commissioner of  
the Department of Insurance of  
the State of California,

Defendants.

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Plaintiffs American Bankers Association, The Financial  
Services Roundtable, and Consumers Bankers Association

1 ("Plaintiffs") sued various California state officials (Attorney  
2 General Bill Lockyer, Department of Insurance Commissioner John  
3 Garamendi, Commissioner of the Department of Corporations William  
4 P. Wood, and Commissioner of the Department of Financial  
5 Institutions Howard Gould) (collectively, "Defendants") on the  
6 ground that the affiliate sharing provisions of California's  
7 Financial Information Privacy Act, commonly referred to as SB1,  
8 ("SB1") are preempted by federal law. This Court granted  
9 Defendant's motion for summary judgement. On appeal, the Ninth  
10 Circuit reversed holding that federal law does partially preempt  
11 SB1 and instructed this Court to ascertain the scope of that  
12 preemption. Specifically, this Court is to decide whether any  
13 part of SB1's affiliate sharing provision survives preemption  
14 and, if so, can that surviving portion be severed from the  
15 remainder of SB1. For the reasons set forth below, this Court  
16 finds that SB1's affiliate sharing provision does not survive  
17 preemption and, even if some limited applications could be saved,  
18 they cannot be severed from the remainder of the statute.

## 20 **BACKGROUND**

21  
22 This case involves the convergence of the Fair Credit  
23 Reporting Act ("FCRA"), as amended by the Fair and Accurate  
24 Credit Transactions Act of 2003 ("FACTA"), Title V of the Gramm  
25 Leach Bliley Act ("GLBA") and California's SB1. These four  
26 legislative enactments generally seek to govern the treatment of  
27 personal information albeit to varying degrees. In FCRA, FACTA  
28 and GLBA, Congress created a statutory framework that seeks to

1 strike a balance between providing citizens affordable financial  
2 services while protecting them against invasions of privacy and  
3 the misuse of personal information. Through SB1, the California  
4 Legislature is seeking to accord the citizens of California with  
5 more stringent protections than those afforded under the federal  
6 scheme which has given rise to this litigation.<sup>1</sup>

7  
8 **STANDARD**  
9

10 Plaintiffs have styled their motion as one for declaratory  
11 relief. The operation of the Declaratory Judgment Act is  
12 procedural only. Skelly Oil Co. v. Phillips Petroleum Co., 339  
13 U.S. 667, 671, 94 L. Ed. 1194, 70 S. Ct. 876 (1950) (citations and  
14 quotations omitted). Generally, declaratory judgment actions are  
15 justiciable if "there is a substantial controversy, between  
16 parties having adverse legal interests, of sufficient immediacy  
17 and reality to warrant the issuance of a declaratory judgment."  
18 Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270,  
19 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941). Declaratory relief is  
20 appropriate when, as here, (1) the judgment will serve a useful  
21 purpose in clarifying and settling the legal relations in issue,  
22 and (2) the judgment will terminate and afford relief from the  
23 uncertainty, insecurity, and controversy giving rise to the  
24 proceeding. Eureka Federal Sav. & Loan Asso. v. American  
25 Casualty Co., 873 F.2d 229, 231 (9th Cir., 1989) (citations and

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26  
27 <sup>1</sup>While the additional protections of SB1 extend to both  
28 affiliate sharing of information as well as third party  
information sharing, only the affiliate sharing provisions are at  
issue here.

1 quotations omitted).

2 Plaintiffs are also seeking injunctive relief against  
3 enforcement of SB1's affiliate sharing provisions. In ruling on  
4 a request for injunctive relief, the trial court considers the  
5 irreparable injury to the moving party and the inadequacy of  
6 legal remedy for such injury. See Weinberger v. Romero-Barcelo,  
7 456 U.S. 305, 312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d 91 (1982).  
8 When seeking a preliminary injunction, a party must demonstrate  
9 either (1) a combination of probable success on the merits and  
10 the possibility of irreparable injury if relief is not granted;  
11 or (2) the existence of serious questions going to the merits  
12 combined with a balancing of hardships tipping sharply in favor  
13 of the moving party. Int'l Jensen, Inc. v. Metrosound U.S.A., 4  
14 F.3d 819, 822 (9th Cir., 1993). The standard for a permanent  
15 injunction is essentially the same as for a preliminary  
16 injunction with the exception that the plaintiff must show actual  
17 success on the merits rather than a mere likelihood of success.  
18 See Amoco Production Co. et. al. v. Village of Gambeel et. al.,  
19 480 U.S. 531, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). When  
20 Actual success on the merits is shown, however, the inquiry is  
21 over and a party is entitled to relief as a matter of law  
22 irrespective of the amount of irreparable injury which may be  
23 shown. Sierra Club v. Penfold, 857 F.2d 1307, 1318 n.16 (9th  
24 Cir., 1988).

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**ANALYSIS**

As explained above, the Ninth Circuit declared that FCRA's affiliate sharing preemption clause preempts SB1 insofar as it attempts to regulate the communication between affiliates of information as that term is used in 15 U.S.C. § 1681a(d)(1). That is, SB1's affiliate sharing provision is preempted to the extent that it applies to information shared between affiliates concerning consumers' "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used, expected to be used, or collected for the purpose of establishing eligibility for credit or insurance, employment, or other authorized purposes. See Am. Bankers Ass'n. v. Gould, 412 F.3d 1081, 1087 (9th Cir., 2005). This Court has been charged with determining whether, applying this restricted meaning of "information," any portion of the affiliate sharing provision of SB1 survives preemption and, if so, whether it is severable from the portion that does not.

**1. Survival**

Defendants first contend that a significant portion of information, as defined above, falls outside the preemptive reach of FCRA. Defendants argue that although FCRA appears to encompass a broad spectrum of information, there is a whole host of information that does not meet the definition of information as that term is used in 15 U.S.C. § 1681a(d)(1), leaving

1 California free to govern the sharing of that information among  
2 affiliates. This Court disagrees.

3 For information sharing to be preempted under FCRA, the  
4 information must satisfy two conditions. First, it must fall  
5 within the scope of information governed by FCRA. Specifically,  
6 it must concern a consumer's "credit worthiness, credit standing,  
7 credit capacity, character, general reputation, personal  
8 characteristics, or mode of living." Id. Second, the  
9 information must be for an FCRA authorized purpose. To  
10 constitute an authorized purpose under FCRA, the information must  
11 be "used, expect to be used, or collected for the purpose of  
12 establishing eligibility for credit or insurance, employment, or  
13 [other authorized purposes.] Id. The definition of information  
14 under FCRA is a two pronged inquiry that encompasses both the  
15 scope of information that is governed under FCRA as well as the  
16 purpose for which that information is to be collected, used or  
17 expected to be used. Information that does not meet both the  
18 scope and purpose prongs of information as defined under FCRA is  
19 not federally protected.

20 Defendants concede that virtually all information regarding  
21 a consumer falls within the scope prong of information as defined  
22 under FCRA. Defendants' axial argument, however, is that a vast  
23 sea of information exists that does not meet the purpose prong of  
24 information as defined under FCRA, and therefore, is subject to  
25 SB1. For example, Defendants argue that if information is  
26 collected by a financial institution solely to ascertain whether  
27 an individual is likely to purchase a product, that information  
28 is not subject to FCRA regulation.

1 Plaintiffs argue, however, that it would be virtually  
2 impossible to ascertain in advance whether or not information  
3 collected and shared by a financial institution would satisfy an  
4 FCRA authorized purpose. Plaintiffs contend that parsing what  
5 information meets the purpose prong of information as defined by  
6 FCRA versus that which does not would cast a cloud of uncertainty  
7 over the preemption that Congress has decreed in the FCRA. This  
8 Court agrees.

9 A financial institution may gather and share information  
10 with its affiliates believing in good faith that it is not  
11 required to comply with SB1 because the information will be used  
12 for an FCRA authorized purpose. If, in fact, the information is  
13 not so used, the financial institution would have acted in  
14 violation of SB1 exposing it to the penalties thereunder.<sup>2</sup> This  
15 creates the untenable situation of forcing California financial  
16 institutions to either risk violation of SB1 or comply therewith  
17 whether or not the information is for an FCRA authorized purpose.

18 Further, the same information could be gathered for both  
19 FCRA authorized and unauthorized purposes. Imposing SB1's  
20 requirements on the collection or use of this dual purpose  
21 information necessarily violates FCRA's preemption clause because  
22 California would be imposing a requirement with respect to the  
23 exchange of information among affiliates as expressly prohibited  
24 by FCRA. See 15 U.S.C. § 1681t(b)(2).

25 While in theory it seems financial institutions could

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27 <sup>2</sup>The only certain way to avoid violating SB1 when sharing  
28 information with affiliates, would be to comply with SB1's notice  
and opt out requirements whether or not the information appears  
prospectively to be federally protected.

1 delineate in advance what information enjoys federal protection  
2 and which does not, in practice any such delineation would simply  
3 be conjecture. Accordingly, this Court finds that no portion of  
4 SB1's affiliate sharing provision survives.

## 5 6 **2. Severance**

7  
8 Although we find that no portion of SB1's affiliate sharing  
9 provision survives, we reach the issue of severability as a  
10 distinct ground of preemption. As an initial matter, the parties  
11 agree and this Court concurs that whether a state statute may be  
12 reformed or construed in a manner that preserves its  
13 constitutionality is a question of state, and not federal, law.  
14 Kopp v. Fair Pol. Practices Com., 11 Cal. 4th 607; 905 P.2d 1248;  
15 47 Cal. Rptr. 2d 108 (Cal. Sup. Ct., 1995).

16 Defendants argue that this Court has the authority to sever  
17 only those applications of SB1 that are unconstitutional while  
18 retaining those applications that are not. Essentially,  
19 Defendants are seeking to have this Court reform or rewrite SB1  
20 to save it from constitutional infirmity. In support of their  
21 position, Defendants rely on Kopp wherein the California Supreme  
22 Court rejected the view that "a court lacks authority to rewrite  
23 a statute in order to preserve its constitutionality or that the  
24 separation of powers doctrine ... invariably precludes such  
25 judicial rewriting." 11 Cal. 4th at 615.

26 This precise argument was raised in another federal court  
27 where the court explained that "...a federal court, which derives  
28 its power from the federal Constitution and is bound by



1 principles of federalism, has no power by virtue of California's  
2 separation of powers doctrine, or otherwise, to rewrite a state  
3 statute, even to save it from unconstitutionality." California  
4 Prolife Council PAC v. Scully, 989 F. Supp. 1282, 1301 (D. Cal.,  
5 1998). In fact, the Ninth Circuit has flatly declared that it is  
6 "not within the province of [a federal] court to 'rewrite' [a  
7 state law] to cure its substantial constitutional infirmities."  
8 Tucker v. State of Calif. Dept. of Education, 97 F.3d 1204, 1217  
9 (9th Cir., 1996).<sup>3</sup> The Supreme Court has likewise adhered to  
10 this general principle. See e.g. Am. Booksellers Assn., 484 U.S.  
11 383, 387; 108 S. Ct. 636; 98 L. Ed. 2d 782 (1988) (stating in the  
12 First Amendment context that "we will not rewrite a state law to  
13 conform it to constitutional requirements"); see also Blount v.  
14 Rizzi, 400 U.S. 410, 419, 27 L. Ed. 2d 498, 91 S. Ct. 423 (1971)  
15 (declaring that "it is for Congress, not this Court, to rewrite  
16 the statute").

17 Although eliminating unconstitutional conditions is not  
18 necessarily the same as adding new language, the Supreme Court  
19 has voiced a similar note of caution about eliminating  
20 unconstitutional conditions when a federal court reviews state  
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22 <sup>3</sup>A number of other circuits have followed this same  
23 reasoning. See Eubanks v. Wilkinson, 937 F.2d 1118, 1126 (6th  
24 Cir., 1991) (federal courts "must take the state statute or  
25 ordinance constitutional on the basis of a limiting construction  
26 supplied by it rather than a state court.); see also Hill v. City  
27 of Houston, 789 F.2d 1103, 1112 (5th Cir.) ("[A] federal court may  
28 not itself provide a limiting construction of legislation that is  
not so readily susceptible"), aff'd 482 U.S. 451, 96 L. Ed. 2d  
398, 107 S. Ct. 2502 (1987); see also Erznoznik v. City of  
Jacksonville, 422 U.S. 205, 216, 45 L. Ed. 2d 125, 95 S. Ct. 2268  
(1975) (narrowing construction only permitted if the language is  
"easily susceptible of a narrowing construction").

1 statutes. See, e.g., Welsh v. United States, 398 U.S. 333, 363  
2 n. 15, 26 L. Ed. 2d 308, 90 S. Ct. 1792 (1970) (noting the Court's  
3 more limited discretion "to extend a policy for the States even  
4 as a constitutional remedy").

5 Both parties concede that the only means of severing the  
6 unconstitutional portion of SB1 would be to accord a narrow  
7 construction to the term "nonpublic personal information" by  
8 striking those applications that are unconstitutional.  
9 Defendants are necessarily asking this Court to "dissect an  
10 unconstitutional measure and reframe a valid one out of it by  
11 inserting limitations it does not contain. This is legislative  
12 work beyond the power and function of the court." Hill v.  
13 Wallace, 259 U.S. 44, 70, 66 L. Ed. 822, 42 S. Ct. 453 (1922).  
14 Even were any part of SB1's affiliate sharing provision spared  
15 from constitutional infirmity, this Court lacks the power to  
16 rewrite SB1 to excise those applications that are  
17 unconstitutional.

## 18 19 CONCLUSION

20  
21 The Court finds that a judgment in favor of Plaintiffs will  
22 serve a useful purpose in clarifying and settling the scope of  
23 FCRA preemption as it relates to SB1 and will terminate and  
24 afford relief from the uncertainty, insecurity, and controversy  
25 giving rise to this action. Accordingly, declaratory judgment is  
26 appropriate and final judgement in favor of Plaintiffs is  
27 therefore entered. In addition, the Court finds that Plaintiffs  
28 have established actual success on the merits and are entitled to

1 injunctive relief as a matter of law. Defendants are hereby  
2 permanently enjoined from enforcing SB1's affiliate sharing  
3 provisions as codified in California Financial Code section  
4 4053(b)(1) to the extent they are preempted by 15 U.S.C. section  
5 1681t(b)(2).

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7 IT IS SO ORDERED.

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9 DATED: October 4, 2005

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13 MORRISON C. ENGLAND, JR.  
14 UNITED STATES DISTRICT JUDGE  
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